

No. 17349

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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SIMONE SCOZZARI,

*Appellant,*

*vs.*

GEORGE K. ROSENBERG, District Director, Immigration  
and Naturalization Service, Los Angeles District,

*Appellee.*

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## BRIEF FOR APPELLEE.

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FRANCIS C. WHELAN,

*United States Attorney,*

DONALD A. FAREED,

*Assistant U. S. Attorney,  
Chief of Civil Division,*

JAMES R. DOOLEY,

*Assistant U. S. Attorney,*

600 Federal Building,  
Los Angeles 12, California,  
*Attorneys for Appellee.*



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## BRIEF FOR APPELLEE.

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### Jurisdiction.

Appellant brought action in the court below [T. 3-5],<sup>1</sup> praying for a judgment declaring that the order and decision denying his application under Section

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<sup>1</sup>"T." indicates references to the printed Transcript of Record, and "Br." refers to Appellant's Opening Brief. This Court, by its Order Denying Motion to Dismiss Appeal, etc. [T. 66-67] provided for printing of the record "excluding original exhibits" [T. 67]; and by Stipulation and Order filed in this Court on May 5, 1961, it was provided that exhibits might be considered in their original form without printing. Thus, although a portion of the record of the Immigration and Naturalization Service, which was attached to appellee's Motion for Summary Judgment [T. 7] as Exhibit "A," has been printed, references will be made in this brief to other portions of that record which were not printed, as indicated hereinafter.

"Ex." followed by a number refers to numbered exhibits which were received in evidence at appellant's deportation hearings. These exhibits sometimes consist of several pages; and where appropriate, page numbers are given after the exhibit number. "R." refers to page numbers of the record of appellant's deportation hearings contained in Exhibit "A." Where portions of Exhibit "A" have been printed, references to the printed Transcript of Record will be placed in parentheses after references to the original record, *e. g.* [Ex. 16, p. 1 (T. 21)].

249 of the Immigration and Nationality Act is illegal and void and a denial of due process of law, and restraining his deportation pending outcome of the litigation [T. 5].

The District Court had jurisdiction of appellant's action under the provisions of Section 10 of the Act of June 11, 1946 (Administrative Procedure Act), 60 Stat. 243, 5 U. S. C. A. §1009. Since the judgment of the District Court [T. 15] is a final decision, this Court has jurisdiction of the present appeal from that decision under the provisions of Title 28, U. S. Code, Sections 1291 and 1294(1).

### Statement of the Case.

Appellant is an alien, a native and national of Italy [Ex. 1; R. 2; Ex. 16, p. 2 (T. 22-23)]. He entered the United States as a stowaway, without inspection, and without a passport or other entry document [Ex. 16, p. 3 (T. 23); R. 4, 8]. He claims to have entered during 1923 and to have resided in the United States continuously since that time [Ex. 16, pp. 2, 4 (T. 23, 25); R. 4, 12].

On January 21, 1958 an Order to Show Cause and Notice of Hearing was issued and served upon the appellant, charging, *inter alia*, that appellant was subject to be taken into custody and deported pursuant to Sections 241(a)(1), 241(a)(2), and 241(a)(5) of the Immigration and Nationality Act [Ex. 1]. Pursuant to this Order to Show Cause and Notice of Hearing, a deportation hearing was held at Los Angeles, California on January 31, 1958 [R. 1-31]. At this hearing two additional charges were lodged against the appellant under Section 241(a)(1) of the Immigration

and Nationality Act [R. 29-30; Ex. 14]. On February 12, 1958 the Special Inquiry Officer who presided at this deportation hearing rendered his decision ordering that the appellant be deported from the United States in the manner provided by law on the charges contained in the Order to Show Cause and on the additional lodged charges [See decision in Ex. "A"].

Appellant appealed the Special Inquiry Officer's decision of February 12, 1958 to the Board of Immigration Appeals, United States Department of Justice. On July 2, 1958 that Board held, *inter alia*, that the charge under Section 241(a)(5) of the Immigration and Nationality Act and one of the charges under Section 241(a)(1) of that Act were not sustained, and directed that the case be remanded to the Special Inquiry Officer for the purpose of permitting appellant to file an application for a record of lawful admission under the provisions of Section 249 of the Immigration and Nationality Act [See decision in Ex. "A"].

On September 8, 1958 appellant filed with the Immigration and Naturalization Service, Los Angeles, California, an Application to Create Record of Admission for Permanent Residence under Section 249 of the Immigration and Nationality Act [Ex. 15 (T. 16-19)]; and on December 10, 1958 evidence relating to this application was taken by an Immigrant Inspector [Ex. 16 (T. 21-50), Ex. (T. 51), and Ex. 22 (T. 52); also see documents following Ex. 14 (T. 53-56)]. On March 6, 1959 appellant's application was denied by the District Director, Immigration and Naturalization Service, Los Angeles, California on the ground that appellant had failed to establish that he was a person of good moral character [Ex. (T. 56-59)]. On

April 1, 1959 this denial was affirmed by the Acting Regional Commissioner, Southwest Region, Immigration and Naturalization Service upon the ground (1) that appellant had failed to sustain the burden of proof which was upon him of establishing that he was a person of good moral character, and (2) in the exercise of the administrative discretion conferred by the provisions of Section 249 [Ex. 18 (T. 60-62)].

On May 18, 1959 appellant's deportation hearing was resumed at Los Angeles, California before the Special Inquiry Officer who had presided at the earlier hearing. At this continued hearing there was received in evidence, *inter alia*, documents relating to appellant's Application to Create Record of Admission for Permanent Residence [Exs. 15 (T. 16-19), 16 (T. 21-50), 17 (T. 56-59), and 18 (T. 60-62); R. 34-35] and an Application for Pre-examination, which appellant had previously filed on November 26, 1958 [Ex. 19].<sup>2</sup> On May 29, 1959 the Special Inquiry Officer rendered his decision ordering, *inter alia*, that appellant's application for preexamination be denied and that appellant be deported from the United States in the manner provided by law on the following charges [See Decision in Ex. "A"].

(1) Under Section 241(a)(2) of the Immigration and Nationality Act in that he entered the United States without inspection;

(2) Under Section 241 (a)(1) of the Immigration and Nationality Act in that at the time of entry, he was within one or more of the classes of

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<sup>28</sup> C. F. R. 235 a.1, 23 F. R. 8395, which authorized pre-examination under certain circumstances was revoked effective August 11, 1959 [see 24 F. R. 6477].

aliens excludable by the law existing at the time of such entry, to wit: a stowaway, under Section 3 of the Act of February 5, 1917;

(3) Under Section 241(a)(1) of the Immigration and Nationality Act in that at the time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit: a person who has not presented an unexpired passport or official document in the nature of a passport issued by the government of the country to which he owes allegiance, or other travel document showing his origin and identity, as required by the Passport Act of May 22, 1918, and the Executive Order in effect at time of entry.

Appellant appealed the Special Inquiry Officer's decision of May 29, 1959 to the Board of Immigration Appeals, United States Department of Justice; and on September 28, 1959 this Board ordered that no change be made in the order of the Special Inquiry Officer and that the appeal be dismissed [See decision in Ex. "A"].

On December 30, 1960 appellant instituted the present action [T. 3-5]. In his complaint filed in the District Court appellant did not *per se* challenge the order of deportation outstanding against him; but complained solely of the denial of his Application to Create Record of Admission for Permanent Residence under Section 249 of the Immigration and Nationality Act [T. 4-5].

On February 3, 1961 appellee moved for summary judgment [T. 6-7]; and on March 13, 1961 the Dis-

strict Court entered its Findings of Fact, Conclusions of Law, and Judgment, granting summary judgment in favor of appellee [T. 8-15].<sup>3</sup> The present appeal is from that judgment.

### Statute and Regulations Involved.

Section 249 of the Immigration and Nationality Act, 66 Stat. 219, as amended by Public Law 85-616, approved August 8, 1958, 72 Stat. 546, 8 U. S. C. A. §1259 (See 1960 Cumulative Annual Pocket Part), provides:

“§1259. *Record of admission for permanent residence in the case of certain aliens who entered the United States prior to June 28, 1940.*

A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney Gen-

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<sup>3</sup>Deportation orders, not generally raising any issues of fact for trial *de novo* in the District Court, are frequently reviewed on motions for summary judgment, whether or not applications for discretionary relief are involved. [*Miyaki v. Robinson*, 257 F. 2d 806 (7th Cir. 1958), cert. den. 358 U. S. 894; *Alexiou v. Rogers*, 254 F. 2d 782 (Dist. Col. Cir. 1958); *Nani v. Brownell*, 247 F. 2d 103 (Dist. Col. Cir. 1957), cert. den. 355 U. S. 870; *Vichos v. Brownell*, 230 F. 2d 45 (Dist. Col. Cir. 1958); *Melachrinos v. Brownell*, 230 F. 2d 42 (Dist. Col. Cir. 1956); *Asikese v. Brownell*, 230 F. 2d 34 (Dist. Col. Cir. 1956)]. The use of the summary judgment procedure seems to be particularly appropriate where the only challenge is to the propriety of the denial of discretionary relief [*Civadelic v. Bouchard*, 185 Fed. Supp. 439 (D. C. New Jersey 1960); *Sit Jay Sing v. Nice*, 182 Fed. Supp. 292 (N. D. Calif. 1960)].

eral that he is not inadmissible under section 1182(a) of this title insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—

(a) entered the United States prior to June 28, 1940;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship.”

Effective August 23, 1958,<sup>4</sup> 8 C. F. R. 249.1, 23 F. R. 6545, provided as follows:

“Part 249—*Creation of Record of Lawful Admission for Permanent Residence.*

§249.1 *Application.* Any alien who believes that he meets the eligibility requirements enumerated in section 249 of the act shall apply on Form N-105 to the district director having jurisdiction over his place of residence. The applicant shall be notified of the decision and if the application is denied of the reasons therefor and of his right to appeal within 10 days from the receipt of such notification in accordance with Part 7 of this chapter. If the application is granted, a Form I-151, showing that the applicant has acquired the

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<sup>4</sup>There were minor changes in this regulation after plaintiff filed his application and before it was finally passed upon by the Acting Regional Commissioner. These changes, which are reviewed in Title 8, Code of Federal Regulations, Part 249.1, 1960 Cumulative Pocket Supplement, are not deemed material; however, it should be noted that effective November 26, 1958 “Part 7” of the second sentence of 8 C. F. R. 249.1 quoted above was changed to “Part 103” (23 F. R. 9124).

status of an alien lawfully admitted for permanent residence, shall not be issued until the applicant surrenders any other document in his possession evidencing compliance with the alien registration requirements of former or existing law.”

Effective November 26, 1958, 8 C. F. R. 103.2, 23 F. R. 9121 provided as follows:

“§103.2 *Formal applications and petitions.* Every formal application or petition shall be filed in accordance with the instructions contained thereon, such instructions being hereby incorporated into the particular section of the regulations requiring its submission. A person or guardian may file on behalf of a son, daughter, or ward under 14 years of age. Any required oath may be administered by an immigration officer or person generally authorized to administer oaths. The decision-rendering Service officer may, in his discretion, require the submission of additional evidence, including blood tests, may require the taking of testimony, and may direct the making of any necessary investigation. Any allegations made in addition to, or in substitution for, those originally made shall be made under oath and filed in the same manner as the original application or petition or noted on the original application or petition and acknowledged under oath thereon. Formal applications or petitions received in any Service office shall be stamped to show the time and date of their actual receipt and shall be regarded as filed when so stamped unless returned because they are improperly executed. Foreign language documents submitted shall be accompanied by certified English translations.”

### Issues Presented.

1. Were the proceedings relating to appellant's Application to Create Record of Admission for Permanent Residence fair, in accordance with law, and in conformity with due process of law?

a. Was appellant entitled to a hearing on his application as contemplated by the Administrative Procedure Act?

b. Was the record of appellant's deportation proceedings properly considered by the officials who decided appellant's application?

c. Is reasonable, substantial, and probative evidence required to support the finding that appellant failed to establish that he is a person of good moral character?

d. If required, does the record contain reasonable, substantial and probative evidence to support the finding that appellant failed to establish that he is a person of good moral character?

e. Was the denial of appellant's application, in the exercise of discretion by the Acting Regional Commissioner, arbitrary, capricious, or an abuse of discretion?

## ARGUMENT.

### I.

The Proceedings Relating to Appellant's Application to Create Record of Admission for Permanent Residence Were Fair, in Accordance With Law, and in Conformity With Due Process of Law.

A. Appellant's Application Invoked the Discretion of the Attorney General, and Review of the Decision Thereon Is Confined Within Narrow Limits.

Appellee has found only a few decisions construing Section 249 of the Immigration and Nationality Act [*Weiss v. Esperdy*, ..... F. Supp. .... (S.D. N.Y., March 7, 1961—not reported); *Chan Wing Cheung v. Hagerly*, 192 F. Supp. 452 (D. C. R. I. 1961); *Lum Chong v. Esperdy*, 191 F. Supp. 935 (S.D. N.Y. 1961); *Sit Jay Sing v. Nice*, 182 F. Supp. 292 (N. D. Calif. 1960)] and its predecessor, Section 1 of the Act of March 2, 1929, 45 Stat. 1512 [*United States v. Anastasio*, 120 F. Supp. 435 (D. C. New Jersey 1954), reversed on other grounds 226 F. 2d 912, cert. den. 351 U. S. 931; *Linklater v. Perkins*, 74 F. 2d 473 (Dist. Col. Cir. 1934); *Conti v. Tillinghast*, 1 F. Supp. 981 (D. C. Mass. 1932)].

However, the language of Section 249 on its face reveals that decision upon an application thereunder is “in the discretion of the Attorney General”;<sup>5</sup> as under Section 1 of the Act of March 2, 1929 decision was discretionary with the Commissioner General of Immi-

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<sup>5</sup>This discretion of the Attorney General was by regulation delegated to District Directors “under the executive direction of a regional commissioner” [8 C. F. R. 103.1(f), 23 F. R. 9120].

gration [*Linklater v. Perkins, supra*]. Review of such discretion is confined within narrow limits [Cf. *Jay v. Boyd*, 351 U. S. 345 (1956); *Chao-Ling Wang v. Pilliod*, 285 F. 2d 517 (7th Cir. 1960); *Obrenovic v. Pilliod*, 282 F. 2d 874 (7th Cir. 1960); *Kam Ng v. Pilliod*, 279 F. 2d 207 (7th Cir. 1960), cert. den. 365 U. S. 860; *MacKay v. McAlexander*, 268 F. 2d 35 (9th Cir. 1959), cert. den. 362 U. S. 961; *Cakmar v. Hoy*, 265 F. 2d 59 (9th Cir. 1959); *Fugiani v. Barber*, 261 F. 2d 709 (9th Cir. 1958), petition for certiorari dismissed, 358 U. S. 924; *Gonzales-Jimenez v. Del Guercio*, 253 F. 2d 420 (9th Cir. 1958); *Anderson v. Holton*, 242 F. 2d 596 (7th Cir. 1957); *United States ex rel. Kaloudis v. Shaughnessy*, 180 F. 2d 489 (2d Cir. 1950); *Batistic v. Pilliod*, 188 F. Supp. 344 (N. D. Ill. 1960), affirmed 286 F. 2d 268 (7th Cir. 1961), cert. den. 29 L. W. 3357, 3358; *United States ex rel. Trujillo-Gonzalez v. Esperdy*, 186 F. Supp. 909 (S. D. N.Y. 1906)]; *Civadelic v. Bouchard*, 185 F. Supp. 439 (D. C. New Jersey 1960); *Angelis v. Bouchard*, 181 F. Supp. 551 (D. C. New Jersey 1960)].

In *Cakmar v. Hoy, supra*, involving the exercise of discretion under Section 243(h) of the Immigration and Nationality Act, 66 Stat. 214, 8 U. S. C. A. §1253(h), this Court apparently limited the scope of review of such discretion to a determination “if procedural due process has been rendered the alien” [265 F. 2d at p. 62].

Also, in *MacKay v. McAlexander, supra*, involving an application for suspension of deportation under Section 244(a)(5) of the Immigration and Nationality Act, 66 Stat. 215, 8 U. S. C. A. §1254(a)(5), this Court declared (p. 40):

“\* \* \* But the granting of such relief to one eligible therefor is *an act of grace entrusted to the discretion of the Attorney General or his delegate*. Jay v. Boyd, 351 U. S. 345, 353, 76 S. Ct. 919, 100 L. Ed. 1242. Judicial review of the exercise of such discretion is *confined within extremely narrow limits*. See Cakmar v. Hoy, 9 Cir., 265 F. 2d 59.” (Emphasis added).

And in *Jay v. Boyd*, *supra*, the Supreme Court pointed out (p. 354):

“\* \* \* Although such aliens have been given a right to a discretionary determination on an application for suspension, cf. *Accardi v. Shaughnessy*, 347 U. S. 260, *a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace*. Like probation or suspension of criminal sentence, it ‘comes as an act of grace,’ *Escoe v. Zerbst*, 295 U. S. 490, 492, and ‘cannot be demanded as a right,’ \* \* \*” (Emphasis added).

**B. The Manner in Which Appellant’s Application Was Processed Was Fair, in Accordance With Law, and in Conformity With Procedural Due Process.**

**1. Appellant Was Not Entitled to a Hearing on His Application as Contemplated by the Administrative Procedure Act.**

Appellant seems to believe that his application required a determination “on the record after opportunity for an agency hearing” as provided for by Section 5 of the Administrative Procedure Act, 60 Stat. 239, 5 U. S. C. A. §1004 [Br. 8]. Appellee submits that such a hearing was not required. Neither Section 249

nor its regulation [8 C. F. R. 249.1, 23 F. R. 6545, 9124] require or provide for a hearing; consequently, Section 5 of the Administrative Procedure Act does not apply [*Weiss v. Esperdy*, .... F. Supp. .... (S. D. N. Y. March 7, 1961—not reported; Cf. *Cakmar v. Hoy*, 265 F. 2d 59 (9th Cir. 1958); *Namkung v. Boyd*, 226 F. 2d 385 (9th Cir. 1955); *Chiu But Hao v. Barber*, 222 F. 2d 821 (9th Cir. 1955), dismissed as moot 350 U. S. 870].

As this Court in *Cakmar v. Hoy*, *supra*, observed (p. 62):

“Appellants are not entitled to a hearing as of right before the Attorney General. The Attorney General can act, or not, as he likes. Section 1004 of the Administrative Procedure Act (5 U.S.C.A.) is not controlling. \* \* \*”

Appellant relies upon *United States ex rel. Paktorovics v. Murff*, 260 F. 2d 620 (2d Cir. 1958) [Br. 8, 11] for the proposition that the Constitution requires a hearing before parole can be revoked. That case, however, because of its peculiar facts, was *sui generis*, as the court was careful to point out [260 F. 2d at p. 613]. That a hearing is not required in the ordinary parole revocation case is demonstrated by the recent opinion in *Ahrens v. Masferrer Rojas*, .... F. 2d .... (5th Cir., June 30, 1961—not yet reported).

Since the regulation promulgated under Section 249 of the Immigration and Nationality Act [8 C. F. R. 249.1, 23 F. R. 6545] does not set forth a procedure for processing and deciding an application thereunder; appellant's application was processed in accordance with the general regulation in effect governing formal appli-

cations and petitions. The latter regulation [8 C. F. R. 103.2, 23 F. R. 9121] provided in part:

“\* \* \* The decision-rendering Service officer may, in his discretion, require the submission of additional evidence, including blood tests, may require the taking of testimony, and may direct the making of any necessary investigation\* \* \*”

In accordance with the regulation quoted above, appellant, while represented by counsel, was interrogated on December 10, 1958 by an immigrant inspector [Ex. 16 (T. 21-50)]. During this interrogation appellant presented as evidence a letter dated December 8, 1958 from an insurance agent [Ex. 16, p. 25 (T. 49-50); Ex. “A,” fourth document from end (T. 53)]. Appellant also presented as evidence a record of his wife’s birth [Ex. 21 (T. 51)], his marriage certificate [Ex. 22 (T. 52)], and the affidavits of two persons [Ex. “A,” documents second and third from end (T. 54-56)].

In his Brief [Br. 7] appellant urges that the “entire record relating to appellant’s application filed under the provisions of Section 249, *supra*, is fully set forth in the transcript of the record, pages 12-62, inclusive.” This is not true. The decisions of the District Director [Ex. 17 (T. 56-59)] and the Acting Regional Commissioner [Ex. 18 (T. 60-62)] reveal that they also considered the record of appellant’s deportation proceedings, and exhibits annexed thereto. Such consideration was in conformity with the regulation quoted above, as well as with procedural due process of law [Cf. *Namkung v. Boyd*, *supra*; *Chiu But Hao v. Barber*, *supra*].

C. There Is Reasonable, Substantial, and Probative Evidence, if Required, to Support the Finding That Appellant Failed to Establish That He Is a Person of Good Moral Character.

1. *Reasonable, Substantial, and Probative Evidence Is Not Required.*

While the District Court concluded [Finding of Fact XIII, T. 13; Conclusion of Law IV, T. 14] that there is reasonable, substantial, and probative evidence to support the finding that plaintiff had failed to establish that he is a person of good moral character; we do not believe that such a standard is required. Rule 242(b)(4) of the Immigration and Nationality Act, 66 Stat. 210, 8 U. S. C. A. §1252(b)(4), providing that “no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence,” is not applicable to appellant’s application under Section 249; since such application did not commence a proceeding to determine appellant’s deportability, but rather to determine whether discretionary relief from deportation should be granted. [*Cf. Chao-Ling Wang v. Pilliod*, 285 F. 2d 517, 519-520 (7th Cir. 1960)].

Equally inapplicable is the “substantial evidence” rule embodied in Section 10(e) of the Administrative Procedure Act, 60 Stat. 243-244, 5 U. S. C. A. §1009(e). Clause (5) of that subsection sets up the substantial evidence rule “in any case subject to the requirements of sections 7 or 8 or otherwise reviewed on the record of any agency hearing provided by statute.” As previously discussed [Part B 1, *supra*], Section 249 provides for no hearing, and proceedings thereunder are not subject to the requirements of Sections 7 or 8 of the Administration Procedure Act.

If the administrative authorities have failed to exercise discretion on an erroneous *legal* conclusion that eligibility has not been established, the courts will review the *legal* error and remand for exercise of discretion [*McGrath v. Kristensen*, 340 U. S. 162 (1950); *Des-salernos v. Savoretti*, 356 U. S. 269 (1958)]. Where, however, the administrative conclusion of ineligibility is predicated on a *fact finding*, such as a failure to establish good moral character, the courts will not set aside the administrative decision unless it is arbitrary or capricious or an abuse of discretion [See, *Kam Ng v. Pilliod*, 279 F. 2d 207 (7th Cir. 1960), cert. den. 365 U. S. 860; *United States ex rel. Exarchou v. Murff*, 265 F. 2d 504 (2d Cir. 1959); *Fugiani v. Barber*, 261 F. 2d 709 (9th Cir. 1958); *Brownell v. Cohen*, 250 F. 2d 770 (Dist. Col. Cir. 1957)].

2. *If Required, the Record Contains Reasonable, Substantial, and Probative Evidence.*

At the outset it should be noted that the burden is upon the alien to prove that he is eligible for, and worthy of, a grant of discretionary relief [*Kimm v. Rosenberg*, 363 U. S. 405 (1960); *United States ex rel. Exarchou v. Murff*, 265 F. 2d 504 (2d Cir. 1959); *Brownell v. Cohen*, 250 F. 2d 770 (Dist. Col. Cir. 1957)].

Moreover, while substantial evidence requires “more than a mere scintilla” [*Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229 (1938)]; in determining whether substantial evidence exists, a court will not substitute its judgment for that of the immigration authorities [*Ocon v. Del Guercio*, 237 F. 2d 177, 180 (9th Cir. 1956); *United States v. Butterfield*, 223 F.

2d 804, 810-811 (6th Cir. 1955); *Taranto v. Haff*, 88 F. 2d 85, 86 (9th Cir. 1937); *Alexander v. Butterfield*, 150 F. Supp. 75, 78 (E. D. Mich. 1957); *In re Cartellone*, 148 F. Supp. 676, 681 (N. D. Ohio, 1957), affirmed *sub nom Cartellone v. Lehmann*, 255 F. 2d 101 (6th Cir. 1958), cert. den. 358 U. S. 867); nor will a court weigh the evidence (*Lattig v. Pilliod*, 289 F. 2d 478 (7th Cir. 1961)].

During 1929 appellant executed a Preliminary Form for Declaration of Intention to Become a Citizen [Ex. 10; R. 17]. On this form appellant stated, *inter alia*, that he entered the United States under the name of Carlo Di Nello on January 15, 1923, that he arrived on the Conte Rosso as a passenger, that he traveled on an immigration visa, and that he was examined by immigration officers at New York [Ex. 10]. This information was false, since appellant now admits that he entered the United States as a stowaway, without inspection, and without a passport, visa, or other entry document [Ex. 16, p. 3 (T. 23); R. 4, 8]. On the basis of this false information appellant was able to file a Declaration of Intention [Ex. 8] with the United States District Court at Los Angeles, California, and to be issued a copy thereof [R. 16]; since another person by the name of Carlo Di Nello had in fact lawfully entered the United States on the vessel and at the date and place claimed by appellant [Ex. 9; See also Exs. 11, 12, and 13].<sup>6</sup> The Declaration of Intention [Ex. 8],

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<sup>6</sup>The real Carlo Di Nello had first entered the United States on June 20, 1916 [Ex. 11], returned to Italy during 1922 [Ex. 13], and reentered the United States on January 15, 1923 [Exs. 9 and 13]. The manner in which appellant obtained data pertaining to the re-entry of the real Carlo Di Nello remains a mystery [Ex. 13].

which appellant executed under oath, also contained false information.

On his Alien Registration Form, which was executed under oath on December 16, 1940 [Ex. 2] and on his 1957 and 1958 Address Report Cards [Exs. 6 and 7] appellant repeated portions of the data relating to his claimed entry on January 15, 1923; claiming on his Alien Registration Form to have entered the United States as a "Passenger" (rather than as a "Stowaway") [Ex. 2, item 7(c)] and as a "Permanent Resident" [Ex. 2, item 7(d)]; and claiming on both his 1957 and 1958 Address Report Cards to be in the United States as a Permanent Resident [Exs. 6 and 7].<sup>7</sup>

Appellee submits that these false statements alone constitute substantial evidence that appellant failed to establish that he was a person of good moral character [Cf. *Gonzales-Jamenez v. Del Guercio*, 253 F. 2d 420 (9th Cir. 1958)]. Under the Immigration and Nationality Act of 1952<sup>8</sup> "one who has given false testi-

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<sup>7</sup>Appellant also gave false information on his Alien Registration Form [Ex. 2, item 9] and on his Application for Certificate of Identification [Ex. 3, item 4] concerning his employment; since appellant now admits that he has not been employed since 1936 or 1937 [Ex. 16, p. 7 (T. 29)].

<sup>8</sup>Section 101(f) of the Immigration and Nationality Act, 66 Stat. 172, 8 U. S. C. A. §1101(f) provides in part:

"(f) For the purposes of this Act—

"No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—

\* \* \* \* \*

(5) one who has been convicted of two or more gambling offenses committed during such period;

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act;"

\* \* \* \* \*

"The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character."

mony for the purpose of obtaining any benefits under” the Act is absolutely barred from establishing good moral character [*Buffalino v. Holland*, 277 F. 2d 270, 276-278 (3d Cir. 1960), cert. den. 364 U. S. 863]; and this provision has been applied to an alien who filed a false statement in naturalization proceedings [*Orlando v. Robinson*, 262 F. 2d 850 (7th Cir. 1959)]; but compare *Sharaiha v. Hoy*, 169 F. Supp. 598 (S. D. Calif. 1959)]. While the absolute bar of the 1952 Act may not be applicable to appellant’s false claims,<sup>9</sup> it is indicative of the seriousness of such claims and of current congressional policy towards them [See, *Hintopoulos v. Shaughnessy*, 353 U. S. 72, 78 (1957)]. We submit, therefore, that these false claims alone constitute substantial evidence that appellant failed to establish that he was a person of good moral character; especially since appellant continued to conceal his illegal entry into the United States until its disclosure was compelled. As the Court in *Orlando v. Robinson*, *supra*, tersely remarked (p. 851):

“\* \* \* At the risk of being labeled prosaic we do not classify a prevaricator as a person of good moral character. Certainly mendacity is not a virtue.”

In addition, under the Immigration and Nationality Act of 1952 “one who has been convicted of two or more gambling offenses committed” during the period

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<sup>9</sup>See, however, *In re Naturalization of K*, 174 Fed. Supp. 343 (D. C. Md. 1959), where the court remarked (p. 344):

“\* \* \* In view of the difference in wording between the various numbered paragraphs of sec. 101(f), it may be that such false testimony, whenever given, would be an absolute bar. \* \* \*” (Emphasis added.)

for which good moral character is required to be established is absolutely precluded from establishing good moral character [See Section 101(f)(5), quoted in footnote 8, *supra*; *In re Lee Wee's Petition*, 143 F. Supp. 736 (S.D. Calif. 1956)]. Appellant has been convicted of at least four, and perhaps five, gambling offenses.<sup>10</sup> Here, again, while the absolute bar of the 1952 Act may not be applicable to appellant's convictions, it is indicative of Congressional policy towards gambling offenses as they relate to good moral character. Thus, appellant's repeated convictions of gambling offenses over a span of more than two decades militate strongly against his good moral character. As the Court in *In re Naturalization of K*, 174 F. Supp. 343 (D. C. Md. 1959), observed (p. 345):

“\* \* \* good moral character is not a momentary attribute; *evidence of past misconduct though it may not be a bar if the applicant has in fact reformed, should be received and considered along with other evidence* in determining whether a petitioner has shown good moral character at the time of his or her application.”

See also:

*In re Siacco's Petition*, 184 F. Supp. 803 (D. C. Md. 1960).

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<sup>10</sup>On his Application to Create Record of Admission for Permanent Residence appellant admitted conviction of a gambling offense during each of the years 1928, 1929, 1930, 1945, and 1951 [Ex. 15, item 23 (T. 18)]. The records of the Municipal Court, however, apparently show the 1928 gambling charge as having been dismissed [Ex. 17 (T. 58)]. In addition, appellant was convicted on or about March 27, 1931 for failure to report a gunshot wound and to summon aid. Appellant claimed not to remember this incident, but admitted that “it must be correct” [Ex. 16, p. 13 (T. 36-37)].

Moreover, for at least three years immediately preceding his marriage, appellant cohabited with his present spouse as man and wife [Ex. 16, p. 16 (Tr. 40)]. During this period no impediment to appellant's marrying existed.<sup>11</sup> Appellant married on July 27, 1958 [Ex. 22 (T. 52)], after an order of deportation had been entered against him by a special inquiry officer, and after the Board of Immigration Appeals had rendered its decision of July 2, 1958 directing that the case be remanded to the Special Inquiry Officer for the purpose of permitting appellant to file an application for a record of lawful admission [See decision in Ex. "A"].

We submit that appellant's extra-marital relationship prior to his marriage militates against his good moral character. In *Estrada-Ojeda v. Del Guercio*, 252 F. 2d 904 (9th Cir. 1958) this Court held that an extra-marital relationship alone was sufficient to support the finding that an alien "had not proved that she then was and had been a person of good moral character" (p. 905).

Appellant relies upon *Posusta v. United States*, 285 F. 2d 533 (2d Cir. 1960) [Br. 12]. That case holds "no more than that even a continued illicit relation is not inevitably an index of a bad 'moral character.'" (p. 535—emphasis added). In the *Posusta* case the court noted that there were "greatly extenuating circumstances" (p. 535).

We submit, therefore, that appellant's false claims, his conviction for gambling offenses, and his extra-

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<sup>11</sup>Appellant's claim that he did not marry earlier because he was sick is refuted by his statement that he is still sick and that he is always going to be sick [Ex. 16, p. 16 (T. 40-41)].

marital relationship, when considered together, clearly constitute reasonable, substantial, and probative evidence that appellant failed to establish that he was a person of good moral character (indeed, each alone is probably sufficient); without considering his attendance at the meeting at Appalachin, New York, in November, 1957 and his association with many persons publicly known to have police records [Ex. 16, pp. 17-23 (T. 41-48); R. 19-22]. Appellant, while discussing such attendance and associations in his brief [Br. 9-12] seems to forget that the burden rested upon him to prove that he was eligible for, and worthy of, his requested grant of discretionary relief [*Kimm v. Rosenberg*, *supra*; *United States ex rel. Exarchou v. Murff*, *supra*; *Brownell v. Cohen*, *supra*].

**D. The Denial of Appellant's Application in the Exercise of Discretion by the Acting Regional Commissioner Was Neither Arbitrary nor Capricious nor an Abuse of Discretion.**

Good moral character is merely one of the statutory prerequisites to the exercise of discretion under Section 249 of the Immigration and Nationality Act [See, *Lum Chong v. Esperdy*, 191 F. Supp. 935 (S. D. N.Y. 1961); *Sit Jay Sing v. Nice*, 182 F. Supp. 292 (N. D. Calif. 1960)]; and does not demand its favorable exercise: (Cf. *Hintopoulos v. Shaughnessy*, 353 U. S. 72 (1957); *Jay v. Boyd*, 351 U. S. 345, 349-350 (1956); *MacKay v. McAlexander*, 268 F. 2d 35 (9th Cir. 1959), cert. den. 362 U. S. 961; *Clair v. Barber*, 258 F. 2d 558 (9th Cir. 1958); *Barreiro v. Brownell*, 215 F. 2d 585 (9th Cir. 1954), cert. den. 348 U. S. 887; *United States ex rel. Kaloudis v. Shaughnessy*, 180 F. 2d 489 (2d Cir. 1950)].

As the Supreme Court in *Jay v. Boyd, supra*, pointed out (p. 353):

“Eligibility for the relief here involved is governed by specific statutory standards which provide a right to a ruling on an applicant’s eligibility. However, Congress did not provide statutory standards for determining who, among qualified applicants for suspension, should receive the ultimate relief. *That determination is left to the sound discretion of the Attorney General.*” (Emphasis added).

The Acting Regional Commissioner not only found in his decision that appellant had failed to sustain the burden of proof which is upon him of establishing that he is a person of good moral character, but went further and denied the application “*in the exercise of the discretion conferred by Section 249 of the Immigration and Nationality Act*” [Ex. 18 (T. 60-63)]. In so doing, the Acting Regional Commissioner did not act in an arbitrary or capricious manner, but gave sound reasons for his unfavorable exercise of discretion [Ex. 18, second page (T. 61-62)], including the fact that appellant has had “*no real substantial visible means of support since 1936*” [Ex. 18 (T. 62)—emphasis added; see also Ex. 16, pp. 6-15 (T. 28-36)].

Undoubtedly appellant’s attendance at the Appalachian meeting and his lack of candor in stating the circumstances of his attendance were factors in the discretionary denial of his application under Section 249 [Ex. 18, second page (T. 61-62)]. In this regard, appellant refers to (without citing) *United States v. Buffalino*, 285 F. 2d 408 (2d Cir. 1960), which reversed the crim-

inal conviction of persons attending the Appalachin meeting [Br. 10]. Of course, appellant's acquittal in the criminal case is not *res judicata* in his administrative proceedings under Section 249 [*Helvering v. Mitchell*, 303 U. S. 391 (1938); *Lewis v. Frick*, 233 U. S. 291 (1914)]; and, needless to say, there is a vast difference between a criminal prosecution, in which the Government must prove its case beyond a reasonable doubt, and a proceeding in which an alien, admittedly deportable, seeks the grant of discretionary relief. The relief which appellant sought by his application under Section 249

“\* \* \* is not given to deportable aliens as a right, but, by congressional direction, it is dispensed according to the unfettered discretion of the Attorney General.” [*Jay v. Boyd*, 351 U. S. 345, 357-358 (1956)].

### Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court in favor of appellee, denying the relief prayed for in appellant's Complaint, should be affirmed.

Respectfully submitted

FRANCIS C. WHELAN,  
*United States Attorney,*

DONALD A. FAREED,  
*Assistant U. S. Attorney,*  
*Chief of Civil Division,*

JAMES R. DOOLEY,  
*Assistant U. S. Attorney,*  
*Attorneys for Appellee.*